

Midwest Minerals, Inc., (“Midwest”) appeals from the Vigo Superior Court’s order denying Midwest’s petition to overturn the decision of the Vigo County Board of Zoning Appeals’ (“BZA”).¹ At issue is whether the BZA properly determined that Midwest’s proposed gas processing unit would engage in “manufacturing” gas, and was thereby required to apply for a special exception. Concluding that chemically transforming extracted natural gas into commercial grade gas constitutes “manufacturing” under Vigo County’s Unified Zoning Ordinance, we affirm.

Facts and Procedural History

Midwest owns more than eleven acres of real estate in West Terre Haute, Indiana. This property is zoned M-2 heavy industrial and was formerly used for coal mining operations. Pursuant to Vigo County’s Unified Zoning Ordinance, (“Zoning Ordinance”)², the purpose of the M-2 heavy industrial district is to provide for establishments that primarily engage in manufacturing, construction, wholesaling, warehousing and associated retail, financial and service activities with a need for outdoor storage, processing, or operation. Vigo County Zoning Ordinance, Ind., § 6-105-10.02(A) (1996). The Zoning Ordinance provides an exhaustive list of permitted uses in the M-2 heavy industrial district, which includes but is not limited to: (1) forest products processing; (2) bottled gas storage and distribution; (3) manufacturing of cement, lime or gypsum; (4) manufacturing of construction equipment and machinery; (5) power plants; and (6) rolling and extruding of metal. See Zoning Ordinance § 6-105-10.02(B)(1).

¹ We remind Appellant’s counsel that Indiana Appellate Rule 45(A)(10) (2007) regarding the contents of the Appellant’s brief provides, “The brief shall include any written opinion, memorandum or decision or findings of fact and conclusions thereon relating to the issues raised on appeal.”

² Vigo County’s Zoning Ordinance can be located at http://www.vigocounty.org/county_code1.htm.

The Zoning Ordinance also provides a list of activities that require obtaining a special exception from the BZA. A special exception is a use permitted under a zoning ordinance upon the showing of certain statutory criteria. Under Vigo County's Zoning Ordinance, such uses include, but are not limited to, battery salvage and recycling, iron and steel production, concrete mixing, and manufacturing gas or chemicals. See Zoning Ordinance § 6-105-10.02(B)(4).

In 2002, Midwest approached the Vigo County Area Planning Department ("Planning Department") about establishing a molecular methane gas processing unit on its property in West Terre Haute. The processing unit would allow Midwest to extract coal mine methane gas and then process it by filtering out impurities to bring the methane gas to commercial grade. The executive director of the Planning Department determined that this activity constituted "manufacturing" gas, and therefore under provisions of the Zoning Ordinance, Midwest was first required to petition for and obtain a special exception from the BZA. See Zoning Ordinance § 6-105-10.02(B)(4).

Midwest did not appeal the Planning Department's decision at that time. Instead, Midwest applied to the BZA for a special exception, which was denied. In December of 2002, Midwest filed an amended verified petition for writ of certiorari, judicial review and declaratory judgment with the Vigo Superior Court, alleging that the BZA erroneously denied Midwest's application for a special exception and further alleging that Midwest was not required to obtain a special exception. The trial court affirmed the BZA's decision, and Midwest appealed.

On April 26, 2004, our court issued a unanimous memorandum decision, concluding, in part, that Midwest had failed to appeal the Planning Department's decision that it was required to obtain a special exception to establish its processing unit. Midwest Minerals v. BZA, No. 84A01-0403-CV-145 (April 26, 2004). Therefore, we determined that Midwest had not exhausted its administrative remedies, which deprived the trial court of subject matter jurisdiction over this claim. Regarding the claim that the BZA erroneously denied Midwest's application for a special exception, we reversed and remanded to the trial court with instructions to order the BZA to enter sufficient findings.

After our decision, on July 13, 2004, Midwest filed an application for appeal of staff decision with the BZA. This application sought to appeal the decision of the Planning Department's executive director that a special exception was necessary for Midwest's proposed gas processing unit. The BZA heard the merits of this appeal on January 12, 2005. Subsequently, it issued findings of fact and concluded that the proposed gas processing unit would engage in "manufacturing" gas and therefore under Zoning Ordinance section 10.02(B)(4), Midwest was required to first obtain a special exception.

On February 11, 2005, Midwest again filed a verified petition for writ of certiorari and judicial review with the Vigo Superior Court. The BZA's determination was affirmed on May 17, 2006. This appeal ensued. Additional facts will be added as necessary.

Standard of Review

Midwest and BZA disagree on the appropriate standard of review. Midwest contends that because we are reviewing whether the municipal ordinance required it to apply for a special exception, we should apply a de novo standard of review. BZA, on the other hand, contends that pursuant to Indiana Code section 4-21.5-5-14(d)(1) (2002), we may grant an appellant relief only if the agency action is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

We note that on appeal there are no factual issues in dispute. Rather, the issue before us is whether Midwest's proposed gas processing unit fits the definition of "gas manufacturing" contained in Zoning Ordinance section 10.02(B)(4). Therefore, we are faced with a legal issue concerning the applicability of the ordinance to these facts.

Generally, we review questions of law decided by an agency de novo. However, an agency's construction of its own ordinance is entitled to deference. The ordinary rules of statutory construction apply in interpreting the language of a zoning ordinance. Under those rules, the express language of the ordinance controls our interpretation and our goal is to determine, give effect to, and implement the intent of the enacting body. When an ordinance is subject to different interpretations, the interpretation chosen by the administrative agency charged with the duty of enforcing the ordinance is entitled to great weight, unless that interpretation is inconsistent with the ordinance itself. If a court is faced with two reasonable interpretations of an ordinance, one of which is supplied by an administrative agency charged with enforcing the ordinance, the court should defer to the agency.

Hoosier Outdoor Adver. Corp. v. RBL Mgmt., Inc., 844 N.E.2d 157, 163 (Ind. Ct. App. 2006), trans. denied. In other words, the construction of the term "manufacturing" as used in the ordinance is a question of law for the court to determine, but whether Midwest's proposed gas processing unit comes within the court's construction of the term

“manufacturing” is a question of fact, which we review with deference. City of Indianapolis v. Campbell, 792 N.E.2d 620, 624 (Ind. Ct. App. 2003).

Discussion and Decision

Vigo County’s Zoning Ordinance requires a company to apply for a special exception if the company is involved in manufacturing gas. Zoning Ordinance § 6-105-10.02(B)(4). However, Midwest contends that its proposed gas processing unit merely purifies the gas through a filtering system to make it commercially useable, and therefore does not constitute “manufacturing.” Br. of Appellant at 6.

The proposed natural gas processing unit would be located on an old coal mine. It would capture natural gas that “bleeds into the mine shafts” and then transport the gas via pipeline to the processing unit. Appellant’s App. p. 20. At this processing unit, the gas would pass through a pressurized filter several times to remove contaminants. In fact, the filter’s chamber can vary the pressure to allow certain contaminants to be filtered out one at a time. The contaminants would then be vented out of the processing unit. Once the gas is commercial grade, it would be transported to a customer for retail use.

Upon these facts, the executive director of the Planning Department determined that the processing unit would engage in “manufacturing” gas. In his Determination of Use, he concluded that a raw material would be transported to the processing unit via a pipeline, where it would then be processed to manufacture a product to be utilized by customers off-site. Id. at 20. The executive director also noted that the processing would create by-products. Id.

The Zoning Ordinance defines manufacturing as “engag[ing] in the mechanical or chemical transformation of materials or substances into new products, including the assembling of component parts, the creation of products, and the blending of materials, such as lubricating oils, plastics, resins, or liquors.” Zoning Ordinance § 6-105-2(B). Looking at the plain language of this ordinance, there is no doubt that transforming the chemical composition of gas to create a new product is “manufacturing.” Therefore, we address whether under the facts of this case, Midwest’s proposed gas processing unit would engage in manufacturing of gas.

Midwest has proposed to purify the raw material by extracting some chemical elements. Midwest proposes to create a pressurized chamber that would allow it to individually remove contaminants from the gas. In particular, from the testimony before the BZA, Midwest is interested in removing the chemical element nitrogen. Appellant’s App. p. 13. Large quantities of salt water would also be a byproduct of the coal bed methane extraction. See Editorial, Powder River Showdown, N.Y. Times, Aug. 4, 2002, § 4. Under the Zoning Ordinance, manufacturing is defined, in part, as the “chemical transformation of materials or substances into new products.” Zoning Ordinance § 6-105-2(B). Therefore, Midwest is undoubtedly transforming the chemical composition of the gas to manufacture a new commercial grade gas. Just because the raw material and the product created are both gases does not necessarily mean that a chemical transformation has not occurred.

Although Indiana courts have not previously addressed the definition of “manufacturing,” our conclusion is supported by the Supreme Court of New Mexico’s

analysis in Pan American Petroleum v. El Paso Natural Gas Co., 477 P.2d 827 (N.M. 1970). In that case, the court analyzed the term “manufacturing” as it was defined in the 1963 New Mexico Oil and Gas Manufacturer’s Privilege Tax Act. In holding that the company’s actions constituted “manufacturing,” the New Mexico Supreme Court indicated that the most critical determination was that the process at issue changed the condition or makeup of the gas to make it acceptable for pipeline transportation. Id. at 829. The court stated:

It was necessary that the gas before being transported in the pipelines of the defendant, be processed so that the liquids therein could be removed so that the gas could be delivered to the consuming public in a safe condition and so that water or other impurities in the gas be removed to prevent the corrosion of plaintiff’s pipelines and to render same satisfactory for sale to the consuming public.

Id. at 829-830.

Likewise, Midwest’s proposed gas processing unit would change the chemical composition of the gas it extracted, transforming the raw material into commercial grade gas by removing chemical elements in order to make the gas fit for pipeline transportation and commercial use. Therefore, we conclude that the BZA did not err as a matter of law in determining that Midwest’s proposed gas processing unit would engage in manufacturing gas and consequently was required to apply for a special exception.

Affirmed.

NAJAM, J., and MAY, J., concur